IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

MONDAY, THE 18TH DECEMBER 2006 / 27TH AGRAHAYANA 1928

WP(C).No. 18336 of 2006(G)

PETITIONER:

M/S.JOSEPH & SONS BUILDERS (P)LTD,
KALPETTA, WAYANAD, REPRESENTED BY MANAGING
DIRECTOR JOSEKUTTY.

BY ADV. SRI.P.V.JYOTHI PRASAD

RESPONDENTS:

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1. THIRUR MUNICIPALITY,
REP.BY SECRETARY,
THIRUR, MALAPPURAM DISTRICT.

2. ICIC KINFRA LTD,
T.C.2/3598, PATTOM,
TRIVANDRUM - 4.

R2 BY ADV. SRI.C.UNNIKRISHNAN (KOLLAM)
R1 BY ADV.SRI.T.L.ANANTHASIVAN, SC

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 18/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

PIUS C. KURIAKOSE, J.

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W.P.(C) No.18336 OF 2006

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DATED THIS THE 18TH DECEMBER, 2006

J U D G M E N T

The petitioner is M/s.Joseph & Sons Builders (P) Ltd. construction contractors and the respondents are the Tirur Municipality and the ICICI Kinfra Ltd. The 2nd respondent invited tenders for construction of a stadium-cum-commercial complex on 10 acres of land owned by the 1st respondent on BOT basis. One of the conditions in the invitation for tenders was that the contractor should have an average turnover of Rs.One Crore calculated from the audited annual financial statement of past three financial years. The petitioner submitted their tender. After verifying all the documents including the one regarding turnover, the petitioner was permitted to participate in the bid. There were only two bidders and finally the petitioner's bid was accepted. Ext.P1 is copy of the original conditions. The 1st respondent called upon the petitioner to agree for change of some of the conditions stipulated in Ext.P1 and accordingly Ext.P2 revised conditions were agreed upon. Ext.P2 was put up for approval before the Council meeting of the 1st respondent and the same was approved. Thereafter, vide Ext.P3 decision of the Council, the entire documents along with bid evaluation

report prepared by the 2nd respondent was forwarded to the Government for approval. Ext.P4 is the letter sent by the 1st respondent-Municipality to Government. Thereafter, the 1st respondent directed the petitioner to file an affidavit stating that the entire transaction will be through the State Co-operative Bank, Kalpetta. Ext.P5 is copy of that letter. For evaluation of the construction of the Municipal Stadium-cum-shopping complex of the 1st respondent, the Secretary to the Local Self Government Department called for a review meeting on 1.7.2005 and sanctioned the proposal of the 1st respondent with certain modifications. Ext.P6 is copy of the minutes of the review meeting. Pursuant to Ext.P6, Ext.P7 letter was issued to the petitioner calling upon them to submit a DD for Rs.10 lakhs instead of the cheque for Rs.10 lakhs already deposited and to furnish a bank guarantee for Rs.10 lakhs. Accordingly Ext.P8 bank guarantee was produced by the petitioner. Since the petitioner complied with all formalities for the proposed construction of the Rajeev Gandhi Municipal Stadium and shopping complex, the 1st respondent recommended to the State Co-operative Bank to sanction term loan of Rs.143 lakhs to the petitioner. Ext.P9 is copy of the letter received from the Co-operative Bank in that context by the

petitioner. The petitioner submits that even though whatever that was necessary as directed was done by the petitioner, nothing was heard from the side of the 1st respondent so that the petitioner could start the work. Therefore, the petitioner issued a lawyer notice to the 1st respondent to which a reply was given stating that the first condition with regard to turnover of more than Rs.One Crore for the last three years has not been satisfied in the case of the petitioner. Thereafter, by letter dated 30.5.2006, the petitioner was informed that based on the advice of the legal advisor that the petitioner had not satisfied the tender conditions, the 1st respondent cancelled the work awarded to the petitioner. Ext.P10 is copy of that letter. The petitioner submits that the petitioner-Company was formed on 3.5.2004 with the very objective of constructing the building for the local authority and is authorised to take over any partnership firm with all their rights and liabilities. M/s.Malabar Construction was a partnership firm consisting of the Managing Director of the petitioner-Company and his wife. By resolution dated 4.5.2004, the petitioner-Company took over the partnership firm M/s.Malabar Construction. The Directors of the petitioner-Company are partners of the firm M/s.Malabar Construction. M/s.Malabar Construction had a turnover of

more than Rs.One Crore during the previous years. Therefore, since all the partners of the said firm are Directors of the petitioner-Company, the petitioner is also to be deemed as having a turnover of more than Rs.One crore during previous years. Therefore, the reason that the petitioner-Company did not have turnover of more than Rs.One crore during the past three years is no good reason at all for rejecting the petitioner's bid. The cancellation of the contract already awarded to the petitioner-Company has resulted in heavy loss to the petitioner. Huge amounts have been paid to the 2nd respondent for processing and finalising the award of contract in respect of Rajeev Gandhi Municipal Stadium-cum-shopping complex. Those amounts cannot be recovered from the 2nd respondent. Huge amounts are already paid as interest to the State Co-operative Bank for furnishing bank guarantee and in connection with the loan already sanctioned. All these were done on the promise made by the 1st respondent. On these facts, the petitioner has raised several grounds and filed this Writ Petition seeking to quash Ext.P10 by the issue of a writ of certiorari and a writ of mandamus commanding the 1st respondent to award the contract work of Rajeev Gandhi Municipal Stadium-cum-shopping complex as decided and approved by the Government.

2. The 1st respondent-Municipality has filed a detailed counter affidavit. It is contended in para.6 therein as follows:-

"6. It is respectfully submitted that the 1st respondent has appointed the 2nd respondent, viz., ICICI KINFRA Ltd., Trivandrum as their consultants and to submit a report with regard to the Construction, Operation and Maintenance of Statidum and Commercial Complex, Tirur, Malappuram, Kerala State. All the works with regard to the bid document and draft construction agreement etc. were entrusted by the 1st respondent to the 2nd respondent. It was the duty of the 2nd respondent to examine in detail the qualification of the tenderer and other parameters suggested by the Municipality. One of the conditions suggested by the Municipality and accepted by the 2nd respondent for invitation for bidding was that an Average Turnover of Rs.1 Crore as calculated from audited annual financial statements of past 3 years from 2001-02 to 2003-04. The 1st respondent-Municipality has by resolution decided that persons or associations etc. who have a turnover of not less than 1 crore of rupees for the years 2001-02 to 2003-04 alone can bid for the above construction of stadium and shopping complex.

> The 1st respondent bona fide believed that the 2nd respondent would have considered all the parameters required as suggested by the Municipality, for the bid at the time when they have published inviting tenders for the construction of the above stadium. When the petitioner gave the bank guarantee along with the financial statement audited by the Chartered Accountant, the 1st respondent came to know that the petitioner as a limited company does not have a turnover of more than 1 crore for the continuous period of 3 years from 2001 to 2004. The 1st respondent came to know the above fact only when the 1st respondent initiated negotiations. It is respectfully submitted that the petitioner M/s.Joseph & Sons Builders (P) Ltd. is a company registered only on 3.5.04 and therefore it is not possible for the petitioner to have a turnover of Rs.1 crore during the period 2001 to 2004."

Elsewhere it is contended that the partnership firm and private limited company are two different legal entities and as such there cannot be any legal ground to say that the new company is only a continuation of a dissolved partnership firm, even though the partners and directors respectively are one and the same. The 1st respondent had to consider

whether the petitioner-Company had a turnover of not less than Rs.One Crore from 2001 to 2004. Admittedly, the petitioner-Company was formed only on 3.5.2004 and therefore the petitioner cannot satisfy the conditions notified by the Municipality. For partnership firms, liabilities are joint and several and any liability to a third party can be realised from the partnership firm as well as from the individual partners. But in the case of a company, the directors are not personally liable and their liability will be limited to the shares held by them. The cancellation of the work was justified since a very crucial condition was not satisfied.

3. The 2nd respondent-ICICI KINFRA Ltd. has also filed a counter affidavit wherein they contend that the promoters of the petitioner-Company were also the partners of the partnership firm Malabar Construction which was carrying on the same line of business as being carried on by the petitioner-Company. Therefore, for evaluating the financial bids, financial statements such as balance sheet and profit and loss account of both the Company and the partnership firm for the last three years were scrutinised by them and it was found that the petitioner satisfied the average turnover as prescribed as one of the eligibility criteria. The role of the 2nd

respondent is only in assisting the 1st respondent-Municipality in preparing feasibility report, bid documents, bid advertisements, fixing the eligibility criteria, draft financial and technical bids and evaluate the bids received by the 1st respondent and recommend selection of the contractor. It was accordingly that the petitioner was selected as the successful bidder and was recommended to the 1st respondent for award of contract. The award of contract is within the exclusive power of the 1st respondent. The 2nd respondent was not aware of any legal opinion and other matters connected with the cancellation of contract awarded to the petitioner.

4. Sri.P.V.Jyothi Prasad, learned counsel for the petitioner would make persuasive submissions before me on the basis of the pleadings raised by the petitioner and the various materials placed on record. According to him, the condition regarding turnover was incorporated so as to ensure that the contractor was financially stable and was experienced in the line. Since the functionaries of the petitioner-Company themselves were partners in Malabar Construction, their experience in the line is not in dispute. There is every justification for construing the turnover qualification enjoyed by M/s.Malabar Construction as a qualification which is available to the petitioner-

Company. Learned counsel would highlight the inconvenience to which the petitioner-Company has been put and the financial loss already sustained by them, particularly, the amounts which had to be paid to the State Co-operative Bank in the context of the loan and the bank guarantee facility.

5. Sri.T.L.Ananthasivan, learned Standing Counsel for the Tirur Municipality would justify the action of the Municipality. Law cannot ignore the distinction between companies and partnership firms. The petitioner-Company came into existence only in 2004 and therefore cannot by any stretch of imagination claim turnover qualification for periods prior to that year, according to learned Standing Counsel.

6. I have considered the rival submissions made before me in the light of the pleadings raised, materials placed on record and the legal provisions to which my attention was drawn by the learned counsel, particularly those relating to legal personality of companies and partnership firms and the liability of partners and directors in relation to firms or companies, as the case may be. Even though it is clear that due to a mistake committed by the 2nd respondent and perhaps by the Municipality, the petitioner has been put to considerable inconvenience and loss, I do not find any warrant for

invoking the discretionary jurisdiction of this Court under Article 226 of the Constitution for cancelling Ext.P10. It cannot be said that the legal advice on the basis of which the cancellation order was passed by the Municipality was incorrect in any manner. The Writ Petition will stand dismissed. However, other remedies, if any, available to the petitioner-Company are left open. The period during which this Writ Petition was pending before this Court till one month from the expiry of the date when the writ petitioner receives copy of this judgment will be treated by all concerned parties as the period during which the petitioner was bona fide prosecuting other legal proceedings in respect of the same cause of action for purposes of limitation law.

(PIUS C. KURIAKOSE, JUDGE)

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